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Supreme Court of the United States

No. 1195

October Term, 1941.

CITY OF SALAMANCA, HOME OWNERS LOAN CORPORATION, SALAMANCA TRUST COMPANY, SALAMANCA FEDERAL SAVINGS & LOAN ASSOCIATION, FIRST NATIONAL BANK OF SALAMANCA, FRANK A. FORNESS and JESSIE FORNESS,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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INDEX AND TABLE OF CASES.

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Summary Statement of Matter Involved	3
Questions Presented	12
Reasons Relied on for Allowance of Writ	14
Appendix A	23
Appendix B	28

Acts and Statutes Cited.

Constitution of United States, Art. I, 8, 3	13, 15, 29
Act of Feb. 19, 1875	2, 12, 14, 15, 20, 23, 31
Act of Sept. 30, 1890	2, 20, 26
Act of Feb. 28, 1901	2, 26
Judicial Code, Sec. 240 (a)	2
Judicial Code, Sec. 240 (b)	16
Federal Judiciary Act of 1789	17
Revised Rules of Sup. Ct., Rule 36, 5 (b)	20
Constitution of New York State	28
N. Y. Laws of 1822, ch. 204	29
N. Y. Laws of 1849, ch. 378	30
N. Y. Laws of 1881, ch. 188	2, 12, 15, 27
N. Y. Laws of 1942, ch. 231	9
N. Y. Civil Practice Act. Secs. 997-1002	6, 15, 17

Decisions Cited.

Baylies v. Ingram, 84 App. Div. 360	17
Bd. of Comrs. v. United States, 308 U. S. 343	18
Erie R. Co. v. Tompkins, 304 U. S. 64	7, 17, 18
Henderson v. Carbondale etc. Co., 140 U. S. 25	18
Horton v. N. Y. C. etc. Co., 12 Abb. N. C. 30	19

Page

Johnson v. Lehigh V. T. Co., 130 Fed. 392 18
Lamson Consol. etc. Co. v. Bowland, 114 Fed. 639 18
Michaels v. Fishel, 169 N. Y. 381 17
Montant v. Moore, 135 App. Div. 334 19
Nelson v. Down, unreported, N. Y. Sup. Ct. 31
New York v. Dibble, 62 U. S. 366 .....15, 30
Palmer etc. Co. v. Barney Est. Co., 149 App. Div. 136 .. 19
Ryan v. Knorr, 19 Hun. 540 31
U. S. *ex rel.* Kennedy v. Tyler, 269 U. S. 13 .....15, 33
Van Rensselaer v. Snyder, 13 N. Y. 299 17

TEXT AND MISCELLANEOUS CITATIONS.

Willard, John, "Treatise on Law of Real Property" .. 17
Messages of Presidents, Vol. II, 522, 539 .....29, 30
1891 Report, Board of Indian Comrs. 32
1872 Report, Comr. Indian Affairs 32
1874 Report, Comr. Indian Affairs 32
1877 Report, Comr. Indian Affairs 32
1880 Report, Comr. Indian Affairs 32
1892 Report, Comr. Indian Affairs 32
21st Cong., 1st Sess., House Doc. No. 227 29
43rd Cong., 1st Sess., House R. No. 478 32
43rd Cong., 1st Sess., Senate Misc. Doc. No. 122 32
43rd Cong., 2nd Sess., House Misc. Doc. No. 75 32
49th Cong., 1st Sess., House R. No. 2344 32
51st Cong., 1st Sess., Senate R. No. 1680 32
63rd Cong., 3rd Sess., House Doc. No. 1590 32
Cong. Globe, Feb. 24, 1873, page 1666 32
Cong. Record, May 4, 1874, page 3581 32
Cong. Record, Feb. 2, 1875, pages 908-921 32
Cong. Record, Feb. 16, 1875, page 1321 32
N. Y. Assembly Journal of 1871, page 122 30
N. Y. Assembly Doc. No. 30 of 1875 32
22 Col. Law Rev. 101 (Hon. Cuthbert W. Pound) 33

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Petitioners,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Petition for Writ of Certiorari.

The petitioners above named respectfully pray that a writ of certiorari be issued from the Supreme Court of the United States directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify for review and determination a transcript of the record and all proceedings in the case numbered and entitled on

its docket, No. 113, October Term, 1941, United States of America, plaintiff-appellant v. Frank A. Forness and one, defendants-appellees, and certain others above named, intervenors-appellees, and that the decree of the Circuit Court of Appeals and the judgment of the District Court as decreed may be reversed, and that the petitioners may have such other and further relief as may be just and proper.

Opinions Below.

The opinion of the District Court (R. 312-327) is reported in 37 F. Supp. 337. The opinion of the Circuit Court of Appeals (R. 386-412) is reported in 125 F. (2nd) 928.

Jurisdiction.

The order and judgment of the Circuit Court of Appeals (R. 412) was entered on February 5, 1942. Judgment thereon by the District Court was filed and served about March 19, 1942. The jurisdiction of the Supreme Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28 §347).

Statutes Involved.

Three acts of Congress and an act of the New York Legislature are directly involved. All are printed in full in Appendix A to this brief. The acts of Congress are the Act of February 19, 1875, c. 90, 18 Stat. 330; that of September 30, 1890, c. 1132, 26 Stat. 558; and that of February 28, 1901, c. 622, 31 Stat. 819. The act of the New York Legislature, Ch. 188 of N. Y. Laws of 1881, variously recodified, once as Ch. 679 of N. Y. Laws of 1892, is now found in N. Y. Indian Law, §71.

Summary Statement of Matter Involved.

The pertinent facts involved as disclosed by the findings of the District Court based upon uncontradicted evidence are substantially as follows:

The City of Salamanca, having a population of about 10,000 persons, is in the southwestern part of New York State. It is unique among the cities of the United States in that it is located upon an Indian reservation. The title to substantially all lands within the City is by printed form leases, over two thousand in number, all of ninety-nine years duration from February 19, 1892, given by the Seneca Nation of Indians, as authorized by certain Acts of Congress, in consideration of an annual rental fixed by each lease. (Finding I, R. 329-331.)

The suit now involved was commenced in September 1939 by the United States of America on its own behalf and on behalf of the Seneca Nation for judgment that a certain lease be cancelled because of default in paying the rent, and that the Seneca Nation be given immediate possession of the leased lands. (Findings XV and XVI, R. 340; also R. 5-10.) These leased lands are a corner lot, approximately 47 feet by 162 feet, on the principal business street of Salamanca. A brick building costing upwards of $63,000 is located thereon. The original defendants, Mr. and Mrs. Forness, have occupied the premises for many years as their home and place of business. Salamanca Trust Company, which was permitted to intervene as a defendant, owns a mortgage on the premises given in 1934 for $15,000. (Findings VII and VIII, R. 335.)

The Indian lease of the premises provides for an annual rental of $4 until 1991, payable on each February 19th.

(Finding IV, R. 331-333.) The only specific provision for its enforcement, and the one upon which the suit was based (R. 141), is the following paragraph of the lease:

> "And it is further agreed that if the rent, or any part thereof hereby provided for, shall not be paid as herein provided, that the party of the first part may reenter the said premises, or resort to any lawful remedy. to remove all persons therefrom." (R. 333.)

One main question presented by the suit was, what remedies, controlled by what body of law, were made applicable by that language when it was agreed upon in 1892.

Assuming that this is a question of intent, not determined by a disability of the Indians arising from their status or special provisions of the acts authorizing them to lease, the relevant acts and statutes and other background material may help determine what the parties intended by the provision. The acts and statutes directly involved are printed in Appendix A to this petition and brief, and Appendix B cites and quotes certain other official documents and decisions illustrating the peculiar dual control by the State of New York and the United States over the Seneca Nation and its reservations which has existed for a century and a half.

Originally the rental was payable to the Treasurer of the Seneca Nation (R. 133, and §6 of Act of 1875), but an Act of 1901 provided that all such lease moneys should be payable to and recoverable by the United States Indian Agent. Each year for at least twenty-four years before the suit was commenced such Indian Agent sent to each lessee a printed form of notice that a specified amount was becoming due or was past due, including the following statement:

> "Rents are due each year in advance on February 19, and must be paid on or before April 20 thereafter, or interest will be charged from the time that the rent became due." (Finding X, R. 335-336.)

The Seneca Nation knew of and acquiesced in this form of notice (Finding XXI, R. 341), regarded the Indian Agent as having authority to extend the time of payment of the rentals (Finding XX, R. 341), his form of notice was approved by the Department of the Interior (Finding XVIII, R. 340) and his course justified a belief on the part of the lessees, upon which they relied, that the rents would be received although overdue. (Finding XVII, R. 340; Jury Verdict, R. 329.) Two former Indian Agents testified that for many years it had been the custom of that office to accept rentals, regardless of how long in arrears, charging interest at six per cent after two months. (R. 179-180, 194-195.)

Early in 1939 such a notice was sent by the Indian Agent to Mr. Forness claiming to be due rent for nine years, 1931 to 1940, in the amount of $36, besides $8.64 of interest. (Finding XI, R. 337.)

On March 4, 1939, the Council of the Seneca Nation adopted a resolution purporting to cancel all leases which were in default and instructing that steps be taken to recover the lands. (Finding XLV, R. 339.) That was on a Saturday. On the following Monday morning Mr. Forness paid the Indian Agent the sum of $44.64 claimed from him. (Findings XII and XIII, R. 338.) He testified that he had no notice of the resolution when he made the payment, but he had heard some talk that there was going to be some trouble if the rentals were not paid. (R. 198, 202-204.)

The suit now involved, based upon the provision of the lease previously quoted, was commenced about six months after the payment was made. There never was any demand for the rent such as would convey a warning that otherwise forfeiture would be claimed, and a return of the payment never was tendered.

The second main issue in the suit was whether, in the light of the foregoing circumstances and whatever body of law was applicable, a forfeiture was justified.

The Civil Practice Act of New York provides that a right of re-entry reserved in a lease as a remedy for non-payment of rent cannot be availed of without fifteen days notice, and even after judgment for the lessor the lessee has six months to pay the arrears and obtain restoration of the property. (Finding XXII, R. 341-343.) The defendants claimed, and claim now as petitioners, that the lease provisions for re-entry, particularly in the light of the acts and statutes expressly applicable to them and the practical construction they have received for fifty years, intend that re-entry be governed by State law. They also relied and now rely upon the effect of the payment before demand. under common law and equitable principles.

The district Court refused to find that the State law was applicable, but found that the United States and the Seneca Nation were estopped under common law and equitable principles from maintaining the suit, and gave judgment for the defendants. (R. 344-346.)

The United States appealed to the Circuit Court of Appeals, which reversed and directed judgment for the appellant. The Circuit Court of Appeals held that no State

law was applicable because Indians were involved and the United States had not given its consent that any State law should be applicable to them; that the Act of 1875 was not such a consent; apparently it held that any agreement that State laws be applicable which otherwise might be deduced from the lease provision was immaterial in the absence of such consent; that the doctrine of *Erie R. Co. v. Tompkins,* 304 U. S. 64, did not make the State law applicable, the reason unstated but apparently because there was a body of Federal law applicable; that the Federal law applicable was the common law as affected by Congressional intent concerning the Senecas; and that this excluded any need for demand before suit. The Circuit Court of Appeals assumed, and so stated, that the title to these lands came from the United States (R. 390), which is not the fact. (See Appendix B.) It also held that there was no estoppel.

Thus far, dealing only with the pertinent facts directly involved as disclosed by the findings, there appears some of the significance of the judgment below, from the viewpoints of the petitioners Forness, Salamanca Trust Company and City of Salamanca. Because of what has been adjudged to be a default in the sum of $44.64, the petitioners Forness have forfeited a property which cost more than $63,000, the Trust Company has been deprived of its mortgage lien amounting to $15,000, and the City has been deprived of the right to tax the property by reason of its reverting to Indian ownership.*

The following facts, taken from the answers of the intervenors, show that the significance of the adjudication

* Thus far in this petition no notice is taken of the possibility of negotiating a new lease upon a higher rental. Whether such an offer appears to have been made, and what relief it offers, will be discussed in subsequent pages.

goes far beyond what is directly involved. That is not unusual, of course, but there is peculiar reason for it in the present case. It is not overstatement to say that the existence of the City of Salamanca, its three financial institutions, the loans of the H. O. L. C. and the whole business and financial structure of the City are involved.

It appears that the Salamanca Trust Company has other capital in jeopardy besides the Forness mortgage. It has $335,000 of its assets loaned upon 125 mortgages upon leased lands, and is the "owner", *i. e.* lessee, of 31 parcels. Tenders of lease money have been made and refused affecting 25 of the mortgaged properties. (R. 37-38.)

The Salamanca Federal Savings & Loan Association has loans now outstanding aggregating $217,770.10 upon 169 mortgages upon leased lands, and owns 4 parcels. Tenders have been made and refused as to 55 properties. The tenders amount to less than $800, but the mortgages endangered total about $55,000. (R. 96-98.)

The First National Bank of Salamanca owns 16 such mortgages aggregating $20,872.34. Tenders have been made and refused as to three properties. The lease money in default upon those three properties is $7.12, and the mortgages upon them amount to $3,200. (R. 56.)

The H. O. L. C. has outstanding $366,092.24 upon 164 such mortgages. Tenders have been made and refused affecting an unspecified number and amount of them. Mr. Thomas H. Dowd, attorney for H. O. L. C., referred in the course of an argument upon the trial to the method by which a lease forfeiture, such as has been adjudged in the Forness case, could be used by any lessee to defeat all

liens upon the mortgaged property, to the advantage of the lessee and the Seneca Nation. (R. 188-189.)

The City of Salamanca has acquired 279 parcels of leased lands by tax sales, and in addition owns various parcels occupied by fire stations and other municipal facilities. The existence of the City and continuance of its municipal services depend upon real property taxes derived from the leased lands within its borders. Indian rentals constitute a first lien upon the lands, prior even to the charge for governmental services. That is a sufficiently extraordinary situation. Much more disturbing is the situation which has been adjudged below, which is that the Indian rentals are not merely a prior lien, which can be assumed by the City and other subsequent lienors, but that it is a condition of forfeiture without warning which can defeat all tax liability, past and future. The City asserted in its answer that 367 tenders had recently been made and refused upon that many parcels of land, and that the state of law which has been adjudged would "unsettle titles in said city and prevent the loaning of money on any real estate therein," would "disturb the entire life of the community," and would "frustrate the city in its attempts to promote industries and prosperity within its borders." (R. 76-77.)*

Thus far this petition has dealt separately with facts found after admission or proof at the trial, and with facts merely alleged by the answers of the intervenors. The opinion of the Circuit Court of Appeals deals with some additional facts, and hence they must be noticed here.

* A recent act of the Legislature, ch. 231 of N. Y. laws of 1942, recognizes the gravity of this situation and offers some redress.

The plaintiff-appellant had printed at pages 230-283 of the record before the Circuit Court of Appeals its motion for summary judgment and some affidavits and other papers brought together to support it. Those papers were served on the attorney for Mr. and Mrs. Forness the day before the trial was had, and at the commencement of the trial, when the United States attempted to obtain a ruling upon its motion for summary judgment, the District Court denied it, not upon the merits but because it was unseasonable. (R. 137; also R. 377.) Those affidavits and other papers were incomplete when they were served upon Mr. Congdon, they were never served upon the three attorneys for the other defendants or their trial counsel, they were never answered, they were not submitted to the District Judge until after his decision seven months later, there was no oral argument of the motion and it and the facts shown by the papers were not mentioned in the briefs for directed verdict and dismissal or in the opinion of the District Court or in its findings. "No part of these affidavits were ever submitted to the court or ever seen by this [District] court until after the record on appeal had been printed." (R. 377-381.)

The District Court, upon motion of the defendants under Rule 75-h of the Rules of Civil Procedure to correct the record, granted the motion to strike out from the record on appeal the affidavits and other papers aforesaid. (R. 370-385.)

The Circuit Court of Appeals has determined that this correction was not within the power of the District Court (footnote 3, R. 389) but it has not permitted the affidavits to be answered or the motion to strike out to be renewed. The Circuit Court of Appeals has availed itself of the un-

served, unanswered and unadjudicated affidavits, and its decision is largely based thereon.

The important allegation obtained from that source, as summarized in the opinion of the Circuit Court of Appeals, is that the Seneca Nation, "coupled with their cancellation of the leases an offer to re-rent the affected plots on generous terms (at an annual rental of 2½% of the appraised value of the property, less the value of the improvements.) Thus computed, the annual rent on appellee's plot will be $115. Any such lease was to be subjected to all encumbrances which had attached to the cancelled lease." (R. 388-389.) In a subsequent part of the opinion that matter is referred to again, as "decisive" against the argument made by appellees that their property was being subjected to a forfeiture. (R. 408.)

Relying upon the disputed affidavits, it seems that when the Seneca Nation adopted a resolution on March 4, 1939, purporting to cancel all delinquent leases (R. 233-234) it also adopted a resolution that in all cases of terminated leases the premises could be leased thereafter at an annual rental "not less than" 2½% of the assessed valuation. There was no suggestion as to who should have the first or other privilege to lease, no continuance of the encumbrances, no exclusion of improvements from the assessed valuation, and no suggestion as to terms of the new leases, except a new provision that the new leases be automatically terminated by six months delinquency in rent after notice. (R. 235.)

On June 15, 1940, more than fifteen months after the resolution of cancellation and the payment by Forness, long after the suit was commenced and at issue and shortly

before trial, in the course of which neither re-renting proposal was mentioned, the Seneca Nation adopted a resolution for a more specific proposal. (R. 237-248.) Probably this is the one which was "decisive" with the Circuit Court of Appeals, but it was not "coupled with their cancellation of the leases" except by reference in its recitals, and it contained some important provisions not noticed in the Court's summary, notably that all timber and all gas, oil and other mineral rights are to be reserved to the Seneca Nation and may be removed by it at any time, and that rental is to be adjusted each ten years by a board of three, the Seneca Nation and the City each naming one and if they do not agree the third to be named by the Indian Agent.

Questions Presented.

A.

Whether the United States has consented, by the Act of February 19, 1875, or by an entire course of legislation and administration of which that is a part, to the extension of New York State laws over the reservations of the Seneca Nation to the extent that the provisions of State law are applicable to interpretation and enforcement of the re-entry provision of the lease involved herein.

B.

Whether Chapter 188 of the N. Y. Laws of 1881, now found in Section 71 of the Indian Law of that State, which expressly declares that all the general laws of the State are extended over and apply to those parts of the Allegany reservation involved herein, is, by reason of lack

of consent by the United States, violative of Article I Section 8 Subsection 3 of the Constitution of the United States.

C.

Whether the re-entry provision of the lease involved herein could, consistently with the powers and disabilities of the Seneca Nation in 1892, and does, express an intent that the laws of New York State be applicable for enforcement of the lease.

D.

Whether the courts below should, for any reason, have applied the laws of New York State to adjudication of the issues herein.

E.

Whether this suit to cancel the lease because of default in paying the rent and to repossess the leased land on behalf of the Seneca Nation can be maintained in the name of the United States, without demand having first been made in such form as would have given notice that non-payment might result in suit for cancellation and repossession.

F.

Whether this suit can be maintained in view of the equities on behalf of the petitioners arising from the long-continued course of the Indian Agent and his predecessors, with the knowledge and acquiescence of the Seneca Nation, in giving notices in such form and accepting arrears

of rent money in such manner, as would and did lead petitioners to suppose that the only penalty for failure to make timely payment of rent money was liability to pay interest upon the arrears.

G.

Whether this suit can be maintained after payment of the rent money and interest and without tendering its return to the petitioners Forness.

H.

Whether the proposal for a re-rental was before the Circuit Court of Appeals in such form that it could properly base its adjudication upon it.

I.

Whether the proposal for a re-rental is sufficiently consistent with the Act of February 19, 1875, as amended, and sufficiently favorable to the petitioners, to overcome equities which might otherwise exist in their favor and be decisive against a forfeiture.

Reasons Relied on for Allowance of the Writ.

A.

The Act of 1875 in its Sec. 8 contains a provision that "all municipal laws and regulations of said State may extend over and be in force within said villages", etc. The Circuit Court considered this provision alone and decided that "municipal" should be read in its more restricted

sense. (R. 390-391.) Petitioners urge that when the Act of 1875 is read as a whole a broader intent is apparent. They also urge that this intent is even clearer when the language of the act is considered as part of an entire course of legislation and administration, illustrated by the material found in Appendix B of this petition, whereby the United States has recognized for a century or more the propriety of a limited jurisdiction by New York over the reservations involved.

B.

Ch. 188 of N. Y. Laws of 1881, and its present form in N. Y. Indian Laws §71, expressly provides that "all the general laws of the state" are extended over the parts of the Allegany reservation included in Salamanca and the other villages created under the Act of 1875. The argument based on this statute was urged in the District Court, which decided against it (R. 318-321, the statute being referred to there as Ch. 679 of N. Y. Laws of 1892), and it was urged again by the brief of the appellees in the Circuit Court. It was not noticed in the Circuit Court opinion. Probably the statement of that opinion that "state law does not apply to the Indians except so far as the United States has given its consent" (R. 390), was thought to dispose of Ch. 188 of N. Y. Laws of 1881 as well as the N. Y. Civil Practice Act. There can be no doubt about the legislative intent expressed in the 1881 statute. The Circuit Court has held, without express reference but by implication, that the statute violates Article I Section 8 Subsection 3 of the Constitution of the United States.

This decision is erroneous, in the light of *New York v. Dibble,* 62 U. S. 366, 370, and *U. S. ex rel. Kennedy v.*

Tyler, 269 U. S. 13, 16-17. Both decisions, one in 1858 and the other in 1925, relate to the jurisdiction of New York to extend its laws over the Seneca reservations as to matters of general law and order wherein Congress did not expressly authorize or prohibit. In the former case this Court said:

> "Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered."

And again in the 1925 case this Court said:

> "It is enough for present purposes to say that the State of New York, as early as 1849, at the request of the Indians, assumed governmental control of them and their property, passed laws creating and defining the jurisdiction of the peacemaker's courts, administered those laws through its courts, and that Congress has never undertaken to interfere with this situation or to assume control."

The decision of the Circuit Court that the statute of the State enacted in 1881 violates the Federal Constitution may be ground for appeal or writ of error under Section 240 (b) of the Judicial Code as amended, but that seems an uncertain position in view of the fact that the decision was by implication; moreover, it is undesirable that this review be limited to the single question.

C.

The re-entry provision of the lease involved herein, made in 1892 by authority of the Acts of 1875 and 1890, expresses

an intent that the laws of New York be applicable for enforcement of the lease. When Congress validated and authorized renewal of leases previously made under supposed authority of State law, and opened both State and Federal courts to litigation arising, it must have authorized and intended this result. The language used in the lease of 1892, that if the rent was unpaid the Seneca Nation might, "re-enter the said premises, or resort to any legal remedy, to remove all persons therefrom", was appropriately chosen, having a well-established meaning under New York law of that time, to save to the landlord both the remedies of ejectment and summary proceedings. See *Michaels v. Fishel,* 169 N. Y. 381, 388-390; *Baylies v. Ingram,* 84 App. Div. 360, 264-365, affd. 181 N. Y. 518 mem.; *Van Rensselaer v. Snyder,* 13 N. Y. 299; and see a contemporaneous lease form at page 622 of "*A Treatise on the Law of Real Property*", etc., by John Willard, formerly Justice of the Supreme Court, published at Albany in 1869 and 1885. It follows that the Circuit Court erred in holding the provisions of the N. Y. Civil Practice Act, which were existent long before 1875, inapplicable to an action for enforcement of the re-entry clause of the lease.

D.

The Circuit Court held that *Erie R. Co. v. Tompkins,* 304 U. S. 64, was inapplicable (R. 391, 401) but it did not say why. That decision interpreted the Federal Judiciary Act of 1789, c. 20, 28 U. S. C. A. §725, which provides:

> "The laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The subject matter for decision here is rights arising under a lease, originally made under the supposed authority of State law and subsequently renewed under authority given by an Act of Congress. It would seem that the doctrine of *Erie R. Co. v. Tompkins* is applicable. Compare, *Bd. of Comrs. v. United States,* 308 U. S. 343.

E.

The question whether this suit to cancel the lease because of default in paying the rent and to repossess the leased land on behalf of the Seneca Nation can be maintained by the United States, without demand having first been made in such form as would have given notice that non-payment might result in suit for cancellation and repossession, subdivides into several questions. In the first place, the United States can show no clear authorization for itself alone to be plaintiff to enforce this lease made by the Seneca Nation. Secondly, the law of demand is not obsolete learning, no matter how earnestly the Circuit Court may deprecate it. See, *Henderson v. Carbondale Coal and Coke Co.,* 140 U. S. 25; *Lamson Consol. Store Service Co. v. Bowland,* 114 Fed. 639; *Johnson v. Lehigh Valley Traction Co.,* 130 Fed. 392. Thirdly, the inequity of permitting a forfeiture without some demand which would convey a warning, after a long course of dealing tending to the contrary, is clear upon general principles of fair dealing.

F.

The facts as to the continued course of the Indian Agent and his predecessors, with the knowledge and acquiescence of the Seneca Nation, in giving notices to pay rent in such

form and accepting arrears of rent money in such manner as would and did lead petitioners to suppose that the only penalty for failure to make timely payment of rent money was liability to pay interest upon the arrears, were stated earlier in this petition.

It is the law of New York, and probably it is universal law, that if parties to a lease permit a custom to grow up for payment in a different manner than provided in the lease, no sudden return to the terms of the lease to claim a forfeiture will be upheld by the courts. *Horton v. N. Y. C. etc. Co.*, 12 Abb. N. C. 30, affd. 102 N. Y. 697 mem.; *Montant v. Moore*, 135 App. Div. 334; *Palmer etc. Co. v. Barney Est. Co.*, 149 App. Div. 136.

Various countervailing reasons, including the assumption that the $4 rental fixed in 1892 or earlier, concerning which no facts have been offered, was unconscionably low, are suggested by the Circuit Court. (R. 406-409.) It is submitted that an important judgment should not be based upon supposed equities which were not litigated or even suggested in the District Court, and that the District Court judgment, based upon the equitable issues which were litigated, should have been undisturbed.

G.

The petitioners Forness paid the rent money and interest to the Indian Agent. It has never been tendered back, but proceedings have been conducted as though it was never paid. This plain state of facts is not answered by doubts as to the authority of the Indian Agent to act for the Seneca Nation. (R. 391-392.) The fact is that he did so act, by authority of Congress, with the knowledge and

acquiescence of the Indians, in the present case and for many years before.

H.

The proposal for a re-rental was before the Circuit Court only through an offer by the appellant upon the oral argument (R. 408), and by some affidavits very dubiously in the case. (R. 389.) Without waiving the points that the affidavits were never properly served and that the District Court properly struck them from the record, it is at least clear that no opportunity was ever afforded to answer these affidavits, that they were never brought to the attention of the District Court until it had lost jurisdiction for all purposes unless to correct the record, and that the District Court never considered them for any other purpose. To seize upon them as "decisive" for purposes of the Circuit Court's judgment, under those circumstances, is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. (Rule 36, 5, (b) of the Revised Rules of this Court.)

I.

The Act of 1890, amending the Act of 1875, provides that whenever a lease is renewable by terms of the former act it shall be renewable for a term not exceeding ninety-nine years. Looking at the 1875 act, it is clear that renewal of a lease of the same lands covered by his former lease is a right reserved to the owner of improvements erected upon the lands, except that certain "conditions" and the "amount of annual rents" shall be agreed upon between the lessee and the Seneca Nation acting through its councillors. If they cannot reach an agreement each shall

name a referee, and if the two referees fail to agree they shall choose a third person. Under the Acts of Congress, in the very probable event that the arbitration procedure does not arrive at new "conditions" and fix a new rental, apparently the lessee is entitled to continue in possession under the terms of his expired lease.

The new lease, made available to Forness just before going to trial in this suit, seems to depart from the statutory authority in several important particulars. One difference is that it attempts to name the third referee through the Indian Agent, a significant improvement, from the viewpoint of the Department of the Interior and probably from that of the Indians, upon the handiwork of Congress. The second is that the new lease binds Forness to a lease for a longer term than it fixes the amount of annual rents; it merely provides a formula to measure the future rent, and it is not clear whether the value of improvements is excluded after the first ten years. A third important difference is that the new lease will not cover the same lands and interests in them as the previous lease; it reserves to the Seneca Nation the right to cut down Forness's shade trees, if any, drill for gas and oil upon the premises, and enter from time to time to evaluate the reserved rights.

Whether the Circuit Court noted these departures from the authority given by Congress does not appear. Its opinion says nothing about them. Its conclusion that the proposal for re-rental was sufficiently favorable to the petitioners to overcome equities which might otherwise exist in their favor and be decisive against a forfeiture, seems to have been made without a two-sided presentation either of fact or law, and is erroneous.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari in the instant case should be granted.

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